

A

Razali bin Silah v Public Prosecutor

B

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO AB-42JSKS-1-01
OF 2019
MUNIANDY KANNYAPPAN JC
30 SEPTEMBER 2019

C

*Evidence — Witness — Child witness — Witness of tender age
— Discrepancies and contradictions — Whether discrepancies were material
— Sexual Offences Against Children Act 2017 s 17*

D

This was an appeal of the accused against the decision of the sessions court who convicted the accused for an offence under s 14(a) of the Sexual Offences Against Children Act 2017 (Act 792) who was sentenced to four years imprisonment and whipping of one stroke. The accused who was the stepfather of the victim ('SP2') who was 13 years old, had held the breast of the victim as she was getting ready which the victim was traumatised and did not relay the information to her mother orally but wrote a note to her which the mother thought the note paper was waste and threw it away into the bin. The victim's brother, SP4 had confronted the victim of her truancy at school which the victim then told him about the grope and fondle incident. The appellant submitted that: (a) as a result of reference to s 16 of Act 792 by the SCJ, when it was not expressly stipulated in the charge had seriously prejudiced the accused thus occasioning an incurable failure of justice; and (b) the competency of SP2 as a witness was in issue.

E

F

G

Held, dismissing the appeal:

(1) Section 17 of Act 792 which operated independently of s 118 of the Evidence Act 1950 rendered that SP2 was presumed to be competent to give evidence unless the court thinks otherwise (see para 9).

H

(2) The overwhelming feature of this case was the victim's consistency in testimony. A young girl of that tender age came to court to say that she was touched by the accused on her intimate body part, cannot be a lie. Why would she lie if it has not occurred? Her truthful testimony was borne out by the recollection of the whole grope and fondle episode that had befallen her, which had remained intact even after vehement cross-examination, and also the oral revelation to SP4 as well as SD3, fortified by her oral testimony that she had in fact wrote a note on a piece of paper to her mother without even telling her what it was (see para 13).

I

- (3) SP2 being a child of tender age, was unable to accurately remember the date and time of the violation on her, hence the variance of evidence. Such variance did not have fatal effect on the case of the prosecution, specifically SP2's evidence as it did not relate directly to crux of the prosecution's case, which was the grope and fondle act which had befallen SP2. The litmus test was ultimately, albeit the discrepancies and contradictions, whether the case against the accused proven beyond reasonable doubt. The answer was a resounding, yes, as the whole case was buttressed on the valuable testimony of SP2, the victim of lust by the accused, which had remained intact (see para 16).

A

B

C

[Bahasa Malaysia summary]

Ini merupakan rayuan tertuduh terhadap keputusan mahkamah sesyen yang mensabitkan tertuduh untuk satu kesalahan dibawah s 14(a) Akta Kesalahan-Kesalahan Seksusal Terhadap Kanak-Kanak 2017 (Akta 792) yang telah dihukum dengan empat tahun pemenjaraan dan satu sabitan rotan. Tertuduh merupakan bapa tiri mangsa ('SP2') yang berusia 13 tahun, telah memegang buah dada mangsa semasa mangsa sedang bersiap yang mana menyebabkan mangsa mengalami trauma dan tidak menyampaikan maklumat tersebut kepada ibunya secara lisan tetapi menulis satu nota kepada ibunya yang mana ibunya ingatkan kertas nota tersebut adalah sampah dan membuangnya kedalam tong sampah. Abang mangsa, SP4 telah menyoal mangsa mengenai perbuatan ponteng sekolah yang mana mangsa telah kemudiannya memberitahu SP4 mengenai kejadian ramas tersebut. Perayu menghujahkan bahawa: (a) sebagai kesan rujukan kepada s 16 Akta 792 oleh HMS, apabila ianya tidak dinyatakan dalam pertuduhan telah memprejudiskan tertuduh dan menyebabkan kegagalan keadilan yang tidak boleh dipulihkan; dan (b) kompetensi SP2 sebagai seorang saksi adalah menjadi isu.

D

E

F

Diputuskan, mengetepikan rayuan:

G

- (1) Seksyen 17 Akta 972 yang beroperasi secara bebas daripada s 118 Akta Keterangan 1950 menyebabkan SP2 dianggap kompeten untuk memberikan keterangan kecuali mahkamah berpendapat sebaliknya (lihat perenggan 9).
- (2) Sifat jelas dalam kes ini adalah keterangan konsisten mangsa. Seorang gadis muda telah datang ke mahkamah untuk menyatakan bahawa dia telah disentuh oleh tertuduh pada bahagian sulit di badanya, tidak boleh menjadi satu penipuan. Apakah sebab untuk dia menipu sekiranya ianya tidak berlaku? Keterangan benarnya adalah berasaskan peringatan kejadian ramas tersebut yang telah berlaku kepadanya, yang kekal tidak terganggu, walaupun selepas pemeriksaan balas, dan juga pemakluman lisan kepada SP4 dan SD3, dikuatkan lagi dengan keterangan lisannya bahawa dia telah menulis pada satu helaian kertas kepada ibunya tanpa

H

I

A memberitahu ibunya apa kandungan kertas tersebut (lihat perenggan 13).

(3) SP2, yang merupakan seorang kanak-kanak berusia muda, tidak mampu untuk ingat akan tarikh dan masa kesalahan tersebut dilakukan kepadanya, oleh itu, perbezaan dalam keterangan. Perbezaan tersebut tidak mempunyai kesan fatal kepada kes pendakwaan, secara khususnya keterangan SP2 kerana ianya tidak berkaitan kepada asas kes pendakwaan, yang merupakan kejadian ramas yang telah dialami oleh SP2. Ujian litmus adalah, walaupun wujud perbezaan dan percanggahan, sama ada kes terhadap tertuduh dibuktikan melampaui sebarang keraguan munasabah. Jawapannya yang jelas adalah, ya, atas sebab keseluruhan kes berlandaskan keterangan SP2, mangsa nafsu tertuduh, kekal tidak diganggu (lihat perenggan 16).]

D Notes

For cases on child witness, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3403–3419.

Cases referred to

- E *Amar Das v State of HP* (1992) 1 Crimes (Him Pra) 678 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293, FC (refd)
- F *De Silva v PP* [1964] 1 MLJ 81 (refd)
Ganesan v PP [1983] 2 MLJ 369 (refd)
Ho Ming Siang v PP [1966] 1 MLJ 252, FC (refd)
Kee Lik Tian v PP [1984] 1 MLJ 306 (refd)
Kwan Wah Yip & Anor, Re [1954] 1 MLJ 146b (refd)
- G *Law Kiat Lang v PP* [1966] 1 MLJ 215, FC (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Abdul Rahim bin Hj Ahmad & Ors [1988] 3 MLJ 272, HC (refd)
- H *PP v Dato' Mat* [1991] 2 MLJ 186, SC (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
R v Dossi (1918) 13 Cr App Rep 158 (refd)
R v Hayes [1977] 2 All ER 288; [1977] 1 WLR 234, CA (refd)
Ramchit Rajbhar v State of West Bengal 1992 CriLJ 372 (refd)
- I *Rameshwar v The State Of Rajasthan* 1952 AIR 54, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 57(1)

Criminal Procedure Code ss 107(1), 110, 173(m)(i), (m)(ii), 307(1), 311, 316

Evidence Act 1950 ss 118, 133A, 134

Federal Constitution art 145(3)

Sexual Offences Against Children Act 2017 ss 2(1), 14, 14(a), 16, 16(2)(a), 17, 18

Chris Kooi Wei Kit (Kit and Assoc) for the appellant.

Azrul Faiz bin Abdul Razak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Muniandy Kannyappan JC:

[1] This is a criminal appeal. It is against the judgment of the sessions court judge, Taiping ('SCJ'). The accused, who is the appellant to this appeal, has been convicted by the SCJ for an offence under s 14(a) of the Sexual Offences Against Children Act 2017 ('Act 792') which came into force on 10 July 2017. Section 14(a) renders the following:

14 Any person who, for sexual purposes —

(a) touches any part of the body of a child;

...

commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be liable to whipping.

[2] The sentence meted out against the accused is imprisonment for a term of four years and whipping of one stroke. The sentence of imprisonment is to take effect from the date of conviction on 31 January 2019. He now appeals against the said conviction and sentence. Pursuant to s 307(1) of the Criminal Procedure Code (Act 593) ('the CPC'), his appeal has to be against the judgment of the SCJ in respect of any error in law or fact committed by the SCJ and excessive severity of the sentence passed.

[3] The victim of the offence, testified in court as SP2. At time of offence, she was about 13 years old. Thus she is a child under the law (see s 2(1) of Act 792). She has been living with her natural mother and stepfather at Kampung Titi Kasai, 34500 Batu Kurau, Taiping, Perak. The house belongs to the stepfather, the accused. When the mother is at work, she is left with the stepfather at home. On 29 September 2017, she had asked permission from the accused to leave home in order to purchase essentials for her at the shop. She was getting ready. As she was facing the mirror to wear her headscarf, the accused came unexpectedly from the back, held her breast and fondled it for a

- A good 2–3 minutes. She felt angry and wanted to hit him but she was frightened to do so. She was traumatised by the incident. She did not relate the incident to her mother orally but had written a note to her. According to her, the mother thought the note paper is waste, thus threw it away into the bin. The incident was not related orally to her mother as she was afraid the mother would be
- B agitated by the incident, and turn chaotic. One fine day when one of her brothers, whom testified in court as SP4, confronted her about her truancy at school and her conduct of not obeying their mother, she related to him on the grope and fondle incident by their stepfather. SP4 was enraged. Both of them turned up at their mother's workplace in order to report to her of the incident.
- C The mother, whom testified in court as SP1 was equally enraged. They decided to lodge a police report. P1 was lodged on 30 September 2017. It has been the first information report leading to the investigation of the criminal case against the stepfather, whom later accused of the offence under s 14(a) of Act 792 (see s 107(1) of the CPC read together with s 110 of the CPC). The public
- D prosecutor then decided to institute proceeding for the commission of the said offence, against the accused, pursuant to his power, exercisable at his discretion, under art 145(3) of the Federal Constitution. Flowing from that a charge (later amended and exhibited as P6) was preferred against the accused which reads as:

E PERTUDUHAN PINDAAN:

SEK 14(a) AKTA KESALAHAN-KESALAHAN SEKSUAL TERHADAP KANAK-KANAK 2017:

- F BAHAWA KAMU PADA 29/9/2017 JAM LEBIH KURANG 5 PETANG BERTEMPAT DI DALAM RUMAH LOT 27, KAMPUNG TITI KASAI, BATU KURAU, DIDALAM DAERAH TAIPING DIDALAM NEGERI PERAK, TELAH MELAKUKAN PERBUATAN AMANG SEKSUAL FIZIKAL KE ATAS ANAK TIRI KAMU BERNAMA NURUL NABILAH BINTI ABDULLAH, MYKID: 040716-08-0744 DENGAN CARA MERABA BUAH DADA MANGSA. MANGSA ADALAH SEORANG KANAK-KANAK DAN KAMU
- G ADALAH ORANG YANG MEMPUNYAI HUBUNGAN AMANAH DENGAN MANGSA. OLEH YANG DEMIKIAN KAMU TELAH MELAKUKAN SUATU KESALAHAN DI BAWAH SEKSYEN 14(a) AKTA KESALAHAN-KESALAHAN SEKSUAL TERHADAP KANAK-KANAK 2017 DAN BOLEH DIHUKUM DIBAWAH AKTA YANG SAMA.

H HUKUMAN:

- I MANA-MANA ORANG YANG, BAGI MAKSUD SEKSUAL — MENYENTUH MANA-MANA BAHAGIAN BADAN SESEORANG KANAK-KANAK; MELAKUKAN SUATU KESALAHAN DAN HENDAKLAH, APABILA DISABITKAN, DIHUKUM DENGAN PEMENJARAAN SELAMA TEMPOH TIDAK MELEBIHI DUA PULUH TAHUN DAN BOLEH JUGA DIHUKUM DENGAN HUKUMAN SEBAT.

[4] It is plain and obvious from the charge that the offence stipulated to have been committed by the accused is under s 14(a) of Act 792, which on

conviction, shall be punished with imprisonment for a term not exceeding 20 years and shall also be liable to whipping. There is no reference made to s 16 of Act 792. Section 16 provides that an accused shall, in addition to the punishment to which he is liable for such offence (which would include s 14 of the Act) be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less than two strokes. In effect, it is an enhanced penalty than prescribed under s 14 of Act 792. The pre-requisite for application of s 16, the accused is in a relationship of trust with the child who is the victim. On the facts the accused is the victim's stepfather cum guardian. She has been under his care by virtue of s 16(2)(a) of Act 792. As a guardian, he owes a duty of care to the victim, both morally and legally. Thus, he shall not take advantage of her by satiating his lust. Unfortunately, the victim being helpless had to succumb to his abuse. The law abhors such beastly behavior by way of an enhanced penalty. Although the prosecution has not chosen to cite s 16 in the charge against the accused, in order to attract an enhanced penalty, reference is made by the deputy public prosecutor ('DPP') conducting the prosecution as well as the SCJ in her judgment. However, the reference made is transitory. This has been a bone of contention of the learned defence counsel ('DC') Mr Chris Kooi Wei Kit who argued this criminal appeal before me. He mounted an attack by submitting that, as a result of reference to s 16 by the SCJ, when it was not expressly stipulated in the charge, had seriously prejudiced the accused thus occasioning an incurable failure of justice. I find this argument to be a *storm in a tea cup*. Albeit reference made by the SCJ to ss 16, 14 of Act 792 is foundational to the charge against the accused. In fact, the sentence meted out ultimately against the accused is in accord with s 14. The additional proof proffered by the prosecution on the relationship of trust, as required under s 16, does not prejudice the accused, as he is the stepfather of the victim at all material times, hence, *res ipsa loquitur*. Hence, in sum total, reference to s 16 of Act 792 has arisen *abundanti cautela* and cause no prejudice.

[5] When SP2 testified, the SCJ has been cautious. She was mindful of the stark fact that SP2 was a child at the time of abuse by the accused and testimony. There were questions put to SP2 before her testimony, in the following order:

... Bersumpah dan bercakap dalam Bahasa Malaysia ...

PEMERIKSAAN UTAMA

S: Semasa angkat sumpah tadi, faham atau tidak? (1)

J: Saya faham sumpah tadi saya kena bercakap benar.

S: Tahu apa akibat kalau tidak cakap benar? (2)

J: Jika tidak bercakap benar kena hukum.

- A** When she was cross-examined, she was asked the following:
- ...
- PEMERIKSAAN BALAS
- B** ...
- S: Cadangkan kamu sebenarnya tidak faham apa maksud sumpah yang kamu bacakan tadi? (3)
- J: Setuju.
- C** TPR: Bantah soalan.
- S: Cadangkan kamu tidak faham jika kamu tidak bercakap benar, apa akibatnya sebenar kamu tidak tahu? (4)
- J: Tidak setuju.
- D** S: Katakan kamu tidak bercakap tidak betul, kamu tahu apa yang akan berlaku pada ayah tiri kamu? (5)
- J: Saya tidak tahu.
- S: Katakan kamu tidak tahu apa berlaku pada diri kamu jika kamu tidak bercakap benar? (6)
- E** J: Saya tidak tahu.
- S: Kamu tahu apakah tujuan datang ke mahkamah hari ini? (7)
- J: Tahu
- F** S: Boleh bagi tahu kepada mahkamah apa tujuan datang ke mahkamah? (8)
- J: Memberi keterangan.
- S: Kamu tahu apa berlaku selepas kamu habis memberi keterangan? (9)
- G** J: Saya tidak tahu.
- ...

- H** [6] In criminal cases, like present, children of 'tender years' are competent to give unsworn testimony even though they do not understand the nature of the oath, so long as they are possessed of sufficient intelligence to justify the reception of evidence and understand the duty of speaking the truth (see s 133A of the Evidence Act 1950 (Act 56)) The question whether a child is of tender years and has the necessary intelligence will be determined by the judge.
- I** Children who understand the nature of an oath are competent to give sworn testimony. The test is whether the child has sufficient appreciation of the seriousness of the occasion and a realisation that taking the oath involves something more than the duty to tell the truth in ordinary day to day life: *R v Hayes* [1977] 2 All ER 288; [1977] 1 WLR 234.

[7] It is trite as how to deal with a child witness and the rules of evidence applicable are explicit. The law is found in s 118 of the Evidence Act 1950 (Act 56) which prescribes all persons, including a child, are competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. Thus, the trial judge has to determine a child's competency to testify by ensuring that she understands the oath she takes. If she is able to understand, then the child may pursue with her testimony. If she is unable, then the trial will proceed with her unsworn testimony. How does the judge ensure that?

[8] The judge embarks on a series of questions in order to conclude based on the answers given by the child, that the sanctity of oath taken, in its form and spirit, is understood. The child must be able to differentiate between telling the truth and untruth in court and if she is untruthful, what could be the consequence. In that regard, a sieve through the questions posed to SP2, demonstrates that she is fully aware that she is testifying in court and know of the effect of not telling the truth (*see questions numbered as (1), (2), (7) and (8) above*). It is apparent from the record, that SP2 understands the sanctity and effect of the oath taken. She too knows of the effect of not telling the truth in the witness box. Argument has been advanced by the DC conducting hearing of this appeal, that pursuant to the questions (as alluded to above) put to SP2 during the trial by the DC conducting the trial, her competency as a witness is in issue. Further the presumption found in s 17 of Act 792 has been rebutted. This submission is unfounded, as the questions posed is unclear and confusing. See question numbered as (4) which has phrases in the double negative; 'tidak faham' and 'tidak bercakap benar', question number (5) too, 'tidak bercakap tidak betul'. Questions number (6) and (9) are unclear on the usage of 'apa berlaku kepada diri kamu' and 'apa berlaku selepas kamu habis memberi keterangan'. Considering the tender age of SP2, it is expected of the DC to ask simple and clear questions and not to confuse her. Hence the objection taken by the DPP having conduct of the trial. As a result of the timely objection taken, the DC rephrased his question (*see question number (3) followed by (4)*), to which SP2 had answered that she does not agree that she does not know of the consequence of not telling the truth in court. I opine that it is unnecessary for the DC to embark on the questions again on SP2's competency during cross-examination, as SP2, after full evaluation of her competency during examination-in-chief has pursued to testify without any hitches, in fact clearly. She has also been steady and vivid in her testimony. The trial judge was convinced of SP2's competency, thus she was allowed to testify. Premised on those factors, SP2 is both a competent and credible witness. The answers rendered by her is commendable as she could very well recollect what has happened to her with no uncertainty. This coupled with her consistency in testimony only leads to the conclusion that her evidence is rightly accepted and admitted by the trial judge.

A

B

C

D

E

F

G

H

I

- A [9] The law applicable is Act 792. Section 17 of Act 792 which operates independently of s 118 of the Evidence Act 1950 renders that SP2 is presumed to be competent to give evidence unless the court thinks otherwise. By virtue of the appropriate questions asked and the correct answers given by SP2, the competency of SP2 is not in doubt for the court to opine otherwise, thus the
- B court is justified when it ruled that she is a competent witness to the proceeding involving her modesty (see the case of *Rameshwar v The State Of Rajasthan* 1952 AIR 54 SC; *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306).
- C [10] Section 134 of the Evidence Act, speaks of quality of evidence and not quantity. As such a case can be won with a few witnesses and not abundance. The court is always guided by proof of the facts in issue in a criminal trial, which is, is the crime committed and did the accused commit the crime? If
- D sufficient proof is proffered on each ingredient of the offence committed by the accused person, then a prima facie case is proven and if on that case, the defence is unable to rebut it by raising a reasonable doubt, the accused shall be found guilty and convicted (see the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293).
- E [11] As for this case, sufficient amount of witnesses has testified vide credible evidence, to prove the ingredients of the offence. Thus, the requisite actus reus and mens rea is proven beyond reasonable doubt. SP1 is the mother of SP2, the victim. She went to the police station with the victim and one of her sons, SP4 to lodge a report ('P1') on the grope and fondle incident that has befallen SP2.
- F SP2 offered credible evidence, unshaken under cross-examination on the grope and fondle incident. SP4, to whom SP2 had related orally, the grope and fondle incident for the first time, testified. SP3 is the arresting officer who had arrested the accused, who was later produced in court to be charged for the offence. SP5 is the investigation officer of the case who had procured, collected and
- G assembled the evidence, which was produced in court during the trial.
- H [12] When the accused was called upon to enter on his defence, he testified as witness SD1. SD2 is his friend who accounted for the stepson (not SP4) who has proclivity for drug addiction, who testified that he happened to see SP2 in the vicinity where the said stepson and his buddies were consuming drugs. His testimony was totally unrelated to the fact in issue of the case. SD3 is a friend of the accused, whom she takes pity on. Strangely her testimony fits in squarely and consistent with what has happened to SP2. SP2 had in fact related to her also, the grope and fondle act by the accused.
- I [13] Hence, in sum total, the most crucial piece of evidence in this case is by SP2. Unlike for an offence of rape, no medical evidence is available for a case of this nature. But the overwhelming feature of this case is the victim's consistency in testimony. Before testimony in open court, she has related the sore grope and

fondle episode to SP4, as well as SD3. Both of them repeated it in court. A young girl of that tender age comes to court to say that she was touched by the accused on her intimate body part, cannot be a lie. Why would she lie, if it has not occurred? It was a normal day for her when she has to wear a headscarf before leaving the house. But it is abnormal for the accused to approach from the rear and hold her breast and fondle it. It is definitely an abnormal and irrational behavior. He did so to satiate his lust. If the law does not abhor such behavior, for a sexual purpose, how else are children to be safe amongst strangers or even family members like the accused who has such beastly proclivity. Her truthful testimony is borne out by the recollection of the whole grope and fondle episode that has befallen her, which has remained intact even after vehement cross-examination, and also the oral revelation to SP4 as well as SD3. Her consistency in evidence is also fortified by her oral testimony that she had in fact wrote a note on a piece of paper to her mother without even telling her what it was, but unfortunately her mother assumed it was a waste paper which went into the rubbish bin. This piece of evidence remains uncontroverted by the accused, both during cross-examination as well as in his defence under oath. In that regard, it remains not contradicted (see the case of *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). Thus, the prosecution's case is intact with the overwhelming evidence of the victim, SP2, and not deficient (see the case of *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144).

[14] As for the defence, it is apparent on the record that the accused had denied the grope and fondle act. He states that he was framed up with the charge and it came about resulting from the act of revenge by another stepson (Shahrul Fadli) who was detained for rehabilitation at the drugs rehabilitation centre, at his behest. SP2 is supposed to be very close to Sharul Fadli. The accused has also been tough on SP2 as she has been playing truant, not going to school regularly. The accused states that as a result, SP2 was influenced by Shahrul Fadli to throw this allegation against him by making up a story of the grope and fondle act so that he would be dealt with accordingly by the law. What is the effect of such an explanation? Such an explanation does not have the effect of raising a reasonable doubt. It would only mean that the stepson was angry with the accused as a result of the report lodged against him (D7). But the scenario is totally at tangent. The person who lodged the report (P1) against him is his wife, SP1 and not that stepson, Shahrul Fadli, as referred to by the accused. It was another of his stepson, SP4 who accompanied his wife and victim to the police station. In that context, the explanation by the accused ends up in a naught. The SCJ has accorded the most appropriate consideration by scanning the defence of previous enmity raised by the accused, when she found that since the whole family, SP1, SP2, SP4 as well as Shahrul Fadli, is dependent on the accused as source of financial support for the family, it is highly unlikely for SP2 to create a story against the accused, out of spite (see the case of *Ramchit Rajbhar v State of West Bengal* 1992 CriLJ 372 at p 378).

A Furthermore, it is axiomatic that the incident involving Shahrul Fadli and SP2 is separate and distinct. The accused, being a stepfather, is right to have reprimanded Shahrul Fadli and SP2, but that does not mean that he could satiate his lust on SP2. To mix and match the two separate and distinct instances defy logic.

B

C [15] SP1, had subsequently withdrew P1, the police report which had triggered criminal investigation against the accused culminating into a charge against him. The withdrawal report is tendered as D2. The reason given for the withdrawal is that she does not want the incident involving her child SP2 to be prolonged any further. It was stated so in D2. However, she was told she cannot withdraw P1, by the police, as the subject matter involves a child. Premised on the reason given by SP1, and exh D2 which is contemporaneous, it does not mean that the grope and fondle act did not occur. It is a stark fact that the prosecution has pursued the case against the accused person, albeit withdrawal of P1.

D

E [16] The learned defence counsel, has also harped vehemently on the discrepancies and contradictions available on the record in terms of the evidence of SP2. The alleged discrepancy is on the date and time of the grope and fondle incident. It is trite law that discrepancies and contradictions in evidence is bound to be present in any trial, as the testimony of witnesses do not come on in open court a day or two after the incident, but after a year or two. Thus testimony of witnesses is premised on their recollection of the event or incident. Some witnesses come out totally convincing as they may have the gift of a photographic memory but many others bound to contradict. So long as the discrepancies and contradictions are not material and it does not affect the heart-beat of the case or fact in issue need to be proved, and sufficiently explained, it is excusable. Such is the state of affairs in the present case as sieved through the cold print evidence available. SP2, being a child of tender age, was unable to accurately remember the date and time of the violation on her, hence the variance of evidence. Such variance does not have a fatal effect on the case of the prosecution, specifically SP2's evidence as it does not relate directly to crux of the prosecution's case, which is the grope and fondle act which had befallen SP2. The date specified in the charge is not an essential part of the offence committed by the accused (see cases like *Law Kiat Lang v Public Prosecutor* [1966] 1 MLJ 215; *Ho Ming Siang v Public Prosecutor* [1966] 1 MLJ 252; *R v Dossi* (1918) 13 Cr App Rep 158). Moreover, SP2 had testified unreservedly that she could remember the date of the incident on 29 September 2017, based on the police report (P1) lodged on 30 September 2017, a day after the incident. P1 has served as a valuable guide to jog her memory of the grope and fondle act by the accused. The litmus test is ultimately, albeit the discrepancies and contradictions, is the case against the accused proven beyond reasonable doubt (see cases like *De Silva v Public*

G

H

I

Prosecutor [1964] 1 MLJ 81; *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172; *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234). The answer is a resounding, yes, as the whole case is buttressed on the valuable testimony of SP2, the victim of lust by the accused, which has remained intact.

CONCLUSION

[17] An appeal is against the judgment of the trial judge who had the benefit of audible evidence. Premised on that, the SCJ had arrived at the various findings of fact, observations and conclusions based on the evidence proffered during the trial. The judgment by the SCJ is not vitiated by erroneous finding of facts, misapplication of the law applicable to the facts and circumstances of the case.

[18] After having perused the cold print evidence available on the record as well as the submissions made by both the DPP and DC during the hearing of this appeal, my conclusions are the following:

- (a) there is overwhelming evidence tending to the conviction of the accused;
- (b) the factum of the offence committed by the accused has been proven beyond reasonable doubt;
- (c) the victim SP2 has been categorical as to how she was violated by the accused;
- (d) her evidence has been supported on the occurrence of the grope and fondle act by the sworn testimony of SP1, her mother and her brother SP4, to whom she had revealed of the incident with ease. Needless to say with the coming into force of the law relating to sexual offences involving a child, under which the accused was charged, corroboration of SP2's evidence is not necessary. This can be gleaned from s 18 of Act 792, which renders that the court may convict an accused of an offence under the same Act on the basis of the uncorroborated evidence of a child, given upon oath or otherwise. As such SP2's testimony is paramount. In terms of evidence, she has been categorical in her testimony with regard to the fact in issue that an offence under s 14(a) of Act 792, has been committed on her and it is the accused who abused her. SP2 had come out unscathed under cross-examination. She has repeated the violation on her by the accused to her mother SP1, brother SP4 as well as SD3, a defence witness. This goes to demonstrate consistency on her part all along on the incident which had befallen her, which is the subject matter of the charge. Consistency in law, is one of the principles of truth. This aspect of consistency is not challenged under cross-examination by the DC, thus the truthfulness is established beyond reasonable doubt (see the case of *Amar Das v State of HP* (1992) 1 Crimes (Him Pra) 678 (SJ), a decision of the Himachal Pradesh High Court, which is of persuasive authority).

- A Moreover, SP2's evidence is not tainted but intensified by her consistent repetition of the incident to SP1, SP4 as well as SD3 (see the case of *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 (CA), affirmed by the Federal Court);
- B (e) much has been emphasised on the discrepancies over the date and time of the offence being committed on the victim. Those discrepancies are normal for a child who had been violated sexually. Regardless of that she has been categorical and consistent when she essayed the incident so vividly when examined in chief and vehemently cross-examined. She had even jotted down the incident on a piece of paper to inform her mother SP1 but it went unnoticed by SP1. This piece of crucial evidence was not challenged by the defence at all. In sum total, the discrepancies do not matter a jot as the victim has been explicit with details on the factum of the sexual violation on her by the accused;
- C
- D (f) the evidence on oath by the accused does not have the effect of raising a reasonable doubt on the case of the prosecution. His defence that there was a frame up on him as he had gotten another of his stepson, brother of the victim SP2, to whom she was very close, to be booked under the law for self-administration of drugs, thus resulting in SP2 to hurl the accusation against him, does not favor him at all as an explanation to the grope and fondle act committed on SP2. It is emphasised, that stepson is not the one who took the law to action, when the violation on his sister SP2 was discovered, but another step son, SP4. Hence, an existence of an axe to grind by the victim SP2, against the accused is without basis. With the overwhelming evidence of the victim, the defence of false accusation and previous enmity, by the accused is negated;
- E
- F (g) the defence advanced by the accused does not at any cause negate the factum of the charge against him, but only a denial of it. The denial in the face of overwhelming evidence against the accused does not have the effect of raising a reasonable doubt on the offence committed by him. Hence the prosecution has proved its case beyond reasonable doubt (see s 173(m)(i) and (m)(ii) of the CPC); and
- G
- H (h) although the trial judge had made some reference to s 16 of Act 792, it is crystal clear that she had found the accused person guilty, convicted and sentenced him under s 14(a) of the same Act, as stipulated in the charge. The trial judge's reference to s 16 of the Act has no bearing on the conviction and sentence of the accused person, and it has not occasioned a failure of justice.
- I

[19] On the sentence meted out, I have no qualms in not disturbing the sentence meted out against him, which is a sentence according to law by virtue of the direction in *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315. The SCJ has taken into consideration all relevant factors when meting out the

sentence. The SCJ had in her mind, seriousness of the offence committed by the accused as well as rampancy of such offences. The SCJ has been mindful of the age of the accused and his health condition, and that public interest dictates that abhorrence ought to be shown by the court when sentencing him for the offence he had committed on a helpless child. In that regard, the sentence meted out is anchored on the principle of deterrence, specifically for the accused and generally for would be offenders. I am of the view that the sentence meted out by the SCJ is not only in accordance with law as alluded to above, but is proportional to the commission of the beastly act by the accused on a child. The sentence passed, reflects the intention of the Parliament, which had deemed it fit to treat such offences seriously by providing for a maximum of 20 years' imprisonment. Moreover, the Legislature has also deemed it fit to enact a new law in the form of Act 792, to curb such crimes which are in the rise, and the courts would be failing in its duty if seriousness and abhorrence is not demonstrated when meting out an appropriate sentence in such cases. In the premise, the accused is now ordered to serve the sentence of imprisonment of four years which has been stayed and to be inflicted with one stroke of whipping as ordered.

[20] In the upshot, the appeal by the accused person against conviction and sentence is dismissed pursuant to s 316 of the CPC, as there is no sufficient ground for appellate intervention by this court.

[21] After confirmation of the conviction and sentence by this court, there has been an application for stay of execution of the sentence by the accused pursuant to s 311 of the CPC (see also s 57(1) of the Courts of Judicature Act 1964 (Act 91). A stay of execution of the sentence was allowed with bail pending appeal to the Court of Appeal (see the case of *Re Kwan Wah Yip & Anor* [1954] 1 MLJ 146b; *Ganesan v Public Prosecutor* [1983] 2 MLJ 369). The sole basis for allowing the stay is the special circumstance that the accused needs constant medical attention due to his health condition as he is suffering from *prostate hypertrophy*, and has a bladder tumor. The doctor who has been treating the appellant was summoned to enlighten the court on his medical condition. The doctor has explained that the appellant requires medication and it is life-long. There is a need for follow-up treatment at the Taiping General Hospital. The doctor also confirmed that without appropriate and constant medical attention, the appellant would face difficulty in urinating and if that happens, he has to be admitted to the hospital. Premised on the health condition of the appellant, which tantamount to a special and exceptional circumstance, this court finds it appropriate for the appellant to be released on terms as to security for the payment of RM20,000 toward a bail bond with one surety as condition of bail, so as to ensure his attendance at the Court of Appeal when the appeal is heard. Aside that, additional conditions are also imposed to the bail pending appeal, which is justifiable as the conviction is for a

A

B

C

D

E

F

G

H

I

- A non-bailable offence committed by the appellant (see the case of *Public Prosecutor v Dato' Mat* [1991] 2 MLJ 186). The conditions are for him to report to the Batu Kurau police station, once a fortnight; he is not allowed to approach the complainant or her family or premises she lives in, during the period of his release on bail pending appeal (see the case of *Public Prosecutor v Abdul Rahim bin Hj Ahmad & Ors* [1988] 3 MLJ 272); required to go for a follow-up treatment at the Taiping General Hospital and to submit to this court the acknowledgment that he has sought treatment at the hospital.
- B
- C *Finding of guilt and conviction under s 14(a) of the Sexual Offences Against Children Act 2017 maintained. Sentence of four years' imprisonment and whipping of one stroke affirmed.*

Appeal dismissed.

D

Reported by Izzat Fauzan

E

F

G

H

I